IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

MICHAEL J. TREINEN, Plaintiff, vs. LARRY G. MASSANARI, Acting Commissioner of Social Security, Defendant.	No. C00-4053-DEO **ORDER**

I. INTRODUCTION

This matter is before the Court on the plaintiff's, Michael J. Treinen's, appeal of the Social Security Commission's denial of his application for disability benefits under Title II of the Social Security Act (the Act), 42 U.S.C. §§ 401 et. seq. Treinen contends that the administrative law judge (ALJ) relied on a defective hypothetical question. Treinen further contends that the ALJ was obligated to consider the combined effects of his mental deficiencies and other impairments and that the ALJ erred in not finding he was disabled. see Cunningham v. Apfel, 222 F.3d 496, 501 (8th Cir. 2000) (reviewing claim for disability benefits, ALJ is obligated to consider the combined effects of the claimant's physical impairments as well as mental

impairments). Treinen argues that an award of benefits is justified.

After consideration of the parties' briefs and oral arguments, and the relevant case and statutory law, the Court finds this case should be reversed and disability benefits awarded to Treinen.

A. PROCEDURAL BACKGROUND

Treinen filed his initial application for benefits on May 31, 1990, alleging the inability to work since May 27, 1987. (Tr. Vol. 2, p. 134). This application was denied initially and on reconsideration. Treinen filed a second application on September 9, 1996 alleging the inability to work since May 22, 1991. (Tr. Vol. 1, p. 251). He asserts disability based on a combination of having a severe right arm and right shoulder injury that pains him continually and his borderline intellectual functioning. His application was denied initially and on reconsideration. (Tr. Vol. 1, pp. 237, 244). Treinen filed a request for hearing before an ALJ. A hearing was held before an ALJ. (Tr. Vol. 1, p. 52). Treinen's claim was denied on September 12, 1998. (Tr. Vol. 1, p. 15). He sought review of the ALJ's decision by the Appeals Counsel and the Appeals Counsel denied his request for review. (Tr. Vol. 1, p. 4).

Because the Social Security Appeals Council denied his claim, the ALJ's decision and findings stand as the final decision of the Commission. Treinen requests reversal of the ALJ's decision.

B. FACTUAL BACKGROUND

1. INTRODUCTORY FACTS, DAILY ACTIVITIES, THIRD PARTY TESTIMONY, WORK AND VOCATIONAL HISTORY

Treinen was born on March 14, 1960 and was thirty-eight (38) years of age at the time of the ALJ's hearing in 1998. (Tr. Vol. 1, p. 20). He was thirty-two (32) years of age on December 31, 1992, his date last insured. (Tr. Vol. 1, p. 20). Treinen got to the tenth grade in "special education" courses and has since had no special courses or job training. (Tr. Vol. 1, pp. 159-60). He has spent the majority of his time over the years staying home and taking care of his children. He is now forty-one (41) years of age and has not worked out of the home since 1987 when he was twenty-seven (27) years of age.

The Court refers to the testimony given by Treinen before an ALJ during a hearing held to consider his first application for benefits on May 2, 1991. The ALJ relied on the answers to the hypothetical questions asked during this hearing. Therefore, although the ALJ limits the period of time for

consideration of Treinen second application to, “commencing May 22, 1991, and continuing up to and through December 31, 1992,” the Court considers the testimony and evidence provided during the first application to be within the period of time for consideration of Treinen’s second application as the ALJ also relied on the testimony and evidence from this hearing in making his decision.

Treinen testified that he does not have a GED. He stopped schooling while he was in the tenth grade. He stated that he does not read “very good” and states that he can write his name and a few things. (Tr. Vol. 1, pp. 159-60). When asked if he can make simple change he responded, “yeah, kind of, yes.” (Tr. Vol. 1, p. 160). He testified that he starts his day between 7:00 a.m. and 9:00 a.m. and goes to bed between 9:00 p.m. and 10:00 p.m. (Tr. Vol. 1, p. 189). Treinen testified during the hearing on his first application for benefits in 1991 that he makes his children breakfast, a bowl of cereal or something and spends the day watching his children play. (Tr. Vol. 1, p. 189). During the hearing on his second application for benefits in 1998 he testified that now his oldest child makes breakfast for everyone. He testified that for the children’s lunch he makes sandwiches or sometimes “spaghettios.” (Tr. Vol. 1, p.

192). He also testified that he does not clean the dishes but that his wife does that. (Tr. Vol. 1, p. 192). During the hearing on his first application in 1991 he testified that he spends his afternoon picking up stuff around the house before his wife gets home and that he occasionally will vacuum the living room. (Tr. Vol. 1, p. 193). After dinner he normally watches the Disney Channel. (Tr. Vol. 1, p. 194). During the second hearing in 1998 he and his wife testified that he no longer can clean the house and is in much pain. Treinen reported that he becomes "awful tired" when he takes his prescription medication. (Tr. Vol., p. 174).

At the hearing on his first application for benefits in 1991, Treinen's attorney and the ALJ discussed Treinen's nonphysical limitations:

> Atty: Underneath on page two and three it says, transfer summary and this is all done by a Richard Ratray a counselor, it's dated 1/24/1990. It was at the top of the information given to me after it was copied for you.
>
> ALJ: Ok.
>
> . . .
>
> Atty: Okay. Down the fifth paragraph, Judge, the results of this academic

testing suggestions that Michael's scores the end the of the third grade level or –

ALJ: Yeah, I see those notations.

Atty: And then –

ALJ: And the [non]physical limitations in the report. Knowledge at 6th grade level, written knowledge at 2.5 [second grade]. I've got, I've got the report here, yes.

(Tr. Vol. 1, pp. 200-01).

Treinen reported during the hearing on his second application for benefits in 1998 that he "just can't remember a lot of stuff." (Tr. Vol. 1, p. 59). Treinen testified that his wife has to leave him notes as to what to do during the day. (Tr. Vol. 1, p. 59). Treinen reported that he has a significant amount of pain and that the medication he takes for pain has an effect on his ability to work and concentrate. (Tr. Vol. 1, p. 62). He stated, "They make me feel pretty dopey because I'm just not myself. But I don't want to be the other way. . . . being in a lot of pain." (Tr. Vol. 1, p. 62.) He reported that he has his drivers license but that he only drives about twice a week. (Tr. Vol. 1, p. 64). He stated he does not take long

trips and the longest he has been in the car is for a three (3) hour drive to see a doctor. (Tr. Vol. 1, p. 64-65).

Treinen reported during the hearing on his second application in 1998 that he is not able to do much around the house now and that normally he is “laying down or just trying to walk a little bit, stay up and down, up and down.” (Tr. Vol. 1, p. 66). He states he does this because of the continual pain he has in his arm just between his shoulder blades and neck. (Tr. Vol. 1, p. 67).

He reported that he worked as a clean up worker in a packing plant running a high pressure water hose. (Tr. Vol. 1, p. 160). He worked in a garage as an automobile detailer washing and waxing cars, and provided the garage with janitorial services. (Tr. Vol. 1, p. 162). He stated that he worked as a dairy farm worker and he would milk, clean up the area and feed the cows bales of hay. (Tr. Vol. 1, p. 162).

2. MEDICAL HISTORY

Treinen alleges that he is disabled due to right shoulder and rotary cuff injuries and torn tendons with residuals of pain

in combination with his mental and educational deficiencies. (Tr. Vol. 2, p. 243).

Treinen's impairment chronology:

May 1987	He had a right shoulder arthorogram[1] which was normal. (Tr. Vol. 2, p. 261).
June 12, 1987	Due to complaints of continuous recurrent dislocation of his right shoulder (Tr. Vol. 2, p. 265). EMG Normal, no evidence of disc herniation.
June 14, 1987	Iop[r]amida[l] lumbodorsal[2] and cervical myeloradiculography[3] performed found to be normal. (Tr. Vol. 2, p. 265).
June 28, 1987	He was seen for medical consultation by neurologist A.S. Lorenzo. (Tr. Vol. 2, p. 264). Reporting dislocation manifested six months previously, and occurring about 9 time since in relation to his work activity.

[1] Arthorogram: a negative image on photographic film made by exposure to x-rays or gamma rays that have passed through matter or tissue. Stedman's Medical Dictionary, 150 (26th ed. 1995).

[2] Iopromidal lumbodorsal: A radiographic contrast or angiography of the lower back. Stedman's Medical Dictionary, 890, 998 (26th ed. 1995).

[3] Cervical Myeloradiculography: An exam of the neck area for spinal cord and nerve root disease. Stedman's Medical Dictionary, 314, 1166 (26th ed. 1995).

Nov. 10, 1987 Mayo Clinic, Dr. Becker, indicated that it was his feeling Treinen had post-traumatic involuntary right shoulder anterior inferior instability with a recurrent subluxation[4], for which, because of his significant symptoms, he elected to proceed with surgical repair (Tr. Vol. 2, p. 276).

January 1988 During a follow-up evaluation by Dr. Becker as he reported no significant complaints and had been doing his physical therapy. (Tr. Vol. 2, p. 284).

In a report dated January 18, 1988, Dr. Becker stated Treinen would be restricted to lifting over 15 to 20 pounds, and no over head use of his right hand and shoulder (Tr. Vol. 2, p. 285). In this same report, Treinen was given a permanent disability rating of eight (8) percent by Dr. Becker. (Tr. Vol. 2, p. 286).

Feb. 22, 1988 Return visit - no reports of significant discomfort, felt he was progressing well. (Tr. Vol. 1, p. 287).

May 1988 Dr. Becker agreed that he could not return to previous employment operating a high pressure line.

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[4] Subluxation: An incomplete luxation of dislocation; though a relationship is altered, contact between joint surfaces remains. Stedman's Medical Dictionary, 1693 (26th ed. 1995).

	(Tr. Vol. 2, p. 290).
June 1988	Dr. Becker indicated Treinen could return to work full-time without limitation but does recommended modifying the job so does not require use of heavy equipment or any type of lifting overhead or repetitive overhead motions. (Tr. Vol. 2, p. 290).
Oct. 27, 1988	Mayo clinic evaluated (Tr. Vol. 2, p. 294). X-rays were normal, Treinen reported pain and weakness. Dr. Goldman indicated that the "pain drawing" was not consistent with symptomatology.

In a medical report dated January 31, 1989, Dr. Goldman reported that Treinen had reached maximum medical improvement. (Tr. Vol. 2, p. 296). Dr. Goldman reported it was apparent Treinen would "not be able to return to heavy work" but it was "hoped" that his work capability would be increased above the sedentary level. (Tr. Vol. 2, p. 296). In May 1989, Dr. Goldman conducted a re-evaluation of Treinen and indicated in his report that Treinen was apparently going through vocational rehabilitation and retraining. Treinen reported to Dr. Goldman that up until February of 1988 he was able to fish and do other activities but that now he could not engage in these activities

because of the pain. Dr. Goldman's examination revealed that the range of motion of the cervical spine and lumbar spine were all reasonable and full. Dr. Goldman found nothing that would be helped by surgery and suggested that Treinen might be helped by having a psychiatric evaluation or learning pain management. (Tr. Vol. 2, pp. 298-99).

Treinen later had a psychiatric evaluation at the Mayo Clinic.

June 1989	Mayo Clinic has a psychiatric consultation "showed no complaints, signs, or symptoms to suggest clinical depression. Mr. Treinen appeared preoccupied with somatic complaints. Diagnostic impression was of somatoform pain disorder. Referred to the Pain Management Clinic. Mr. Treinen states "I don't believe in it." (Tr. Vol. 1, p. 299).
Jan. 12, 1990	Dr. Prickett, licensed psychologist, Treinen's score on the Wechsler Adult Intelligence Scale indicated low average range of intelligence characterized by average nonverbal skills and borderline verbal skills. (Tr. Vol. 2, pp. 306-07).
June 1990	Theodore R. Liautaud, Psychiatrist stated that Mr. Treinen did meet the diagnostic criteria for

> Recurrent Adjustment Disorder with Depressed Mood. (Tr. Vol. 2, p. 320).

The comments made by psychiatrist Liautaud is in direct conflict with the ALJ's finding that "there is no evidence that learning disabilities were ever diagnosed by any mental health professional." (Tr. Vol. 1, p. 23).

On January 12, 1990, James Prickett, a licensed psychologist, evaluated Treinen on the Weschler Adult Intelligence Scale-Revised ("WAIS-R"), used for formal intelligence testing. (Tr. Vol. 2, pp. 306-07). Treinen obtained a Verbal IQ of 75, Performance IQ of 98, and a Full Scale IQ of 82. (Tr. Vol. 2, p. 306). Treinen's lowest subtest score was a 4 in Arithmetic, which was "in the mentally retarded range." (Tr. Vol. 2, p. 306). Treinen's mathematics and written language skills were in the bottom one percent of the population and his reading level was in the bottom two percent of the population. In the report it states that "for his age group, the client's verbal skills were borderline at the 5th percentile." (Tr. Vol. 2, p. 306).

3. VOCATIONAL EXPERT'S TESTIMONY

At the hearing on May 2, 1991, Jack E. Reynolds, testified as a vocational expert. The ALJ's first hypothetical provided:

> My first assumption is the Claimant is a younger aged individual, 27 years of age at his alleged onset date and 31 currently. He has a tenth grade special ed education and a past relevant work history as noted in Exhibit Number 50. Assume for the purposes of this hypothetical he could lift and carry 20 pounds occasionally, 10 pounds frequently; he has a restriction of motion in the right shoulder including abduction but he has good forearm strength in both hands and he's not so impaired in his left hand and arm; he should perform no overhead reaching with respect to his right arm, he cannot elevate his arm; he should perform no employment which would require detailed or complex tasks; and although he evidenced to the Court that he likes a fast pace environment, nonetheless, I'm going to restrict that working environment to a moderately paced rate and, and so he would not get frustrated if he were to be placed in any position, I would not want a fast paced employment; further, he'd be best employed, if at all, in a position which would require very simple routine repetitive type work. Now, within the confines of this hypothetical could the Claimant return to any of his past relevant work?

(Tr. Vol. 1, pp. 219-20).

Treinen's past work included clean-up worker, automobile detailer, and dairy farm worker. All considered by the ALJ to be unskilled or lower level semi-skilled jobs at medium to heavy levels of exertion. (Tr. Vol. 1, p. 20). The vocational expert response to the ALJ's question was, "No. I believe the hypothetical would take him out of all past work." (Tr. Vol. 1, p. 220). The ALJ asked the vocational expert, "Would there be any unskilled work that he could perform with these limitations that I've noted to you." (Tr. Vol. 1, p. 220). The vocational expert responded:

> I believe the, the hypothetical does allow for some unskilled light work. Some examples would be that of a central supply worker in a hospital setting, a laundry sorter in a laundry setting and a parking lot attendant. I, I would say those three jobs would, would meet with the hypothetical."

(Tr. Vol. 1, pp. 220-21).

The ALJ then asked a second hypothetical which added to the first hypothetical the following limitations:

> Now, let's add to that hypothetical in my second hypothetical that he would have to perform work, if possible, that would provide for positional changes. I mean,

> sitting, you know, and standing throughout the work day. Also that he would perform no position which would require climbing or crawling other than a very infrequent basis due to right arm usage problems, he cannot raise his right arm. Adding these positional changes to the hypothetical and restricting the climbing and crawling, would that preclude the jobs that you have noted in the previous hypothetical from being performed?

(Tr. Vol. 1, p. 222).

The vocational expert responded that, ". . . it would preclude the central supply work, it would eliminate that. It would eliminate the laundry sorter. I believe the parking lot attendant would still exist under this hypothetical. And if you like, I could give you a couple of other jobs that would exist under this hypothetical." (Tr. Vol. 1, p. 222). The vocational expert stated that gate tender and microfilm camera operator would be other jobs that the claimant could do. (Tr. Vol. 1, p. 222).

In his third hypothetical the ALJ changed the lifting and carrying limitation to ten pounds and added additional

limitations. This third hypothetical added to the second hypothetical the following restrictions:

> Now, based on the Claimant's testimony here today, if we were to restrict in my last hypothetical his lifting and carrying to the 10 pound limit that he testified here today and add the fact that he'd have to avoid extremes of the cold, heat and excessive humidity. And I don't know if it'd be terribly relevant but I do want to add the fact that he is allergic to 568 acid if it comes physically in contact with him and I, I don't know whether that would be the case but I want to put that in there anyway. And he could perform no fine fingered continued dexterity with respect to his right hand and he would have some problems bilaterally based on his testimony here today with respect to the right hand but not he left and also from the record and from his testimony here, he has an overall eight percent disability rating primarily based on the right shoulder problems. Taking these into consideration would there be any work that he could perform? That would be, I presume, as a sedentary level work, is that correct?

(Tr. Vol. 1, pp. 222-23).

In response to the ALJ's third hypothetical question the vocational expert testified, "I believe the last two jobs which I gave as a gate tender and a microfilm camera operator would

still exist under this [third] hypothetical." (Tr. Vol. 1, p. 223). The vocational expert went on to say, "I believe the parking lot attendant job could be – could still exist if it was performed as a parking cashier. . ." (Tr. Vol. 1, p. 223).

The ALJ's fourth and final hypothetical question added one more limitation to the third hypothetical question and that was that Treinen would be allowed to lay down for a half hour to an hour in the afternoon:

> I would want to add one last hypothetical one question only. Assuming that he would have to take an afternoon break for a half hour to an hour with which to lay down, would that be capable with any of those positions.

(Tr. Vol. 1, p. 224).

The vocational expert responded, "I believe that would eliminate those positions . . . and likely eliminate any other position within the national economy." (Tr. Vol. 1, p. 224). The ALJ stated that he had no further questions and asked the attorney for the claimant if he would like to follow up. The attorney asked the vocational expert if the restriction of having to take "unscheduled breaks" would eliminate all the jobs

that had been listed. The vocational expert testified, "it would eliminate any job." (Tr. Vol. 1, p. 224).

4. THE ALJ'S DECISION

The ALJ found that Treinen was not disabled. (Tr. Vol. 1, p. 34). In his decision, the ALJ concluded that the "combination of Treinen's impairments is severe, in that the claimant is significantly affected in the ability to perform basic work activities." In evaluating Treinen's claim of mental impairment, the ALJ noted that Treinen's verbal IQ is in the borderline range of intelligence but that Treinen "has shown no evidence of adaptive deficits prior to the age of 22." (Tr. Vol. 1, p. 26). In addition, the ALJ determined that Treinen "had shown only slight restriction in activities of daily living and only slight difficulties in maintaining social functioning as a result of his borderline score in verbal intelligence" prior to his last date insured. (Tr. Vol. 1, p. 26).

The ALJ refers to Treinen's "social functioning" to show that he is able to perform work activity. (Tr. Vol. 1, p. 26). However, the ability to function socially or even to perform

limited activities on his good days is not inconsistent with Treinen's testimony that on his bad days, he cannot function at all or that he has the intelligence to perform the demands of the jobs identified. The ability to engage in sporadic social activities does not mean that the Treinen is able to perform full time competitive work. Burress v. Apfel, 141 F.3d 875, 881 (8th Cir. 1998). This Court finds that the "social functioning" which the ALJ says Treinen has can not be the basis for saying that Treinen possesses the ability to perform the demands of a job.

In addition, Treinen possesses only a tenth grade special education. This is solid evidence of a "prior adaptive deficit" in his earlier years, before he became 22, resulting in Treinen attending special education classes which is directly opposite the ALJ's conclusion that he showed no limitations before he was 22. (Tr. Vol. 1, p. 26).

The ALJ considered all of Treinen's impairments in combination but stated he could find "no evidence that the combined clinical findings from such impairments" reached the

level of severity contemplated in the listings. The ALJ stated that "since there was no evidence of an impairment which meets or equals the criteria of a listed impairment . . . disability cannot be established on the medical facts alone." (Tr. Vol. 1, p. 27). When medical facts alone do not establish a disability then ALJ must proceed to the next step in evaluating a claim and consider the claimant's subjective complaints. The ALJ next considered Treinen's subjective complaints.

Treinen testified that he experiences pain in his right arm and shoulder, neck and lower back since prior to his last day insured. (Tr. Vol. 1, p. 28). He stated that the pain had increased and spread since his last hearing and that he now has pain through his elbow and into his fingers. (Tr. Vol. 1, p. 28). Treinen also alleges that he has become very depressed and that his medications make him feel tired, slow and fatigued. (Tr. Vol. 1, p. 29). The ALJ failed to address in his decision Treinen's allegation that the pain is so severe that he has to be able to change positions at will.

The ALJ found Treinen's and Treinen's wife's assertions regarding the alleged impairments "less then credible." (Tr. Vol. 1, p. 30). The ALJ based part of his determination that Treinen testimony was less then credible on his failure to follow a prescribed course of treatment, i.e. that he did not seek "psychiatric treatment for somatoform pain disorder" or participate in "pain management." (Tr. Vol. 1, p. 29). Treinen argued that there was no "inquiry" by the ALJ as to why Treinen did not participate and that the government has the burden to show that Treinen's willfully refused treatment. A review of the record demonstrates that Treinen has had surgery, has participated in rehabilitation, has participated in vocational programs and takes his prescription medication as directed. One reasons given for finding against Treinen was that he failed to follow a prescribed course of treatment. The ALJ erred in drawing this conclusion when he never addressed whether "the basis of evidence in the record" showed that Treinen's participation in pain management would have improved Treinen's condition. See Burnside v. Apfel, 223 F.3d 840, 844 (8th Cir.

2000) (stating “before a claimant can be denied benefits because of a failure to follow a prescribed course of treatment an inquiry must be conducted into the circumstances surrounding the failure and a determination must be made on the basis of evidence in the record whether the following of the prescribed treatment would have restored [a claimant’s] ability to work or sufficiently improve his condition to work”). The ALJ’s decision states only that Treinen “failed to follow this medical advice.” (Tr. Vol. 1, p. 29).

The ALJ’s explanation for finding that Treinen and his wife were less than credible (Tr. Vol. 1, p. 33) is that “the claimant sought no further treatment for his complaints of pain other than occasional pain medication prior to his date last insured.” (Tr. Vol. 2, p. 30). The record reflects differently. In seeking to cope with the pain Treinen underwent surgery, participated in physical therapy, followed the limitations set by doctors regarding lifting and repetitive use of his right shoulder, worked with an occupational therapist, underwent a psychiatric evaluation, and took prescribed medication as directed. (Tr. Vol. 1, pp. 20-25).

The ALJ found that the restrictions used in the hypothetical questions at the previous hearing were consistent with all the medical evidence. The ALJ used the vocational expert's testimony from the first hearing and concluded that Treinen could not perform his past relevant work because of Treinen's physical limitations. (Tr. Vol. 1, p. 31). The ALJ further found that Treinen "was a younger individual prior to his date last insured with a 10th grade special education and past relevant work at medium to heavy levels of exertion at unskilled and lower level semi-skilled jobs." (Tr. Vol. 1, p. 31). The ALJ stated that the vocational expert testified that Treinen would be able to perform unskilled sedentary jobs including that of gate tender, mircrocamera operator and parking cashier. (Tr. Vol. 1, p. 31). The ALJ stated that "no further vocational expert testimony was elicited by the [ALJ] because he finds that both the [third] hypothetical question posed to the vocational expert and the vocational expert's testimony was consistent with the evidence of record prior to the claimant's date last insured." (Tr. Vol. 1, p. 32).

C. THE COURT'S JURISDICTIONAL BASIS

In Bowen v. Yuckert, 482 U.S. 137 (1987), the United States Supreme Court delineated the steps which precede a district court's review of a Social Security appeal:

> The initial disability determination is made by a state agency acting under the authority and supervision of the Secretary. 42 U.S.C. § 421(a), 1383b(a); 20 C.F.R. §§ 404.1503, 416.903 (1986). If the state agency denies the disability claim, the claimant may pursue a three-stage administrative review process. First, the determination is reconsidered de novo by the state agency. §§ 404.909(a), 416.1409(a). Second, the claimant is entitled to a hearing before an administrative law judge (ALJ) within the Bureau of Hearings and Appeals of the Social Security Administration. 42 U.S.C. §§ 405(b)(1), 1383(c)(1) (1982 ed. and Supp. III); 20 C.F.R. §§ 404.929, 416.1429, 422.201 et seq. (1986). Third, the claimant may seek review by the Appeals Council. 20 C.F.R. §§ 404.967 et seq., 416.1467 et seq. (1986). Once the claimant has exhausted these administrative remedies, he may seek review in federal district court. 42 U.S.C. §405(g).

Yuckert, 482 U.S. 137, 142, 107 S. Ct. 2287, 2291 96 L. Ed. 2d 119 (1987).

Section 1383(c)(3) of Title 42 of the United States Code provides, "The final determination of the Secretary after a hearing . . . shall be subject to judicial review as provided in

section 405(g) of this title. . . ." In pertinent part, 42 U.S.C. § 405(g) provides:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia . . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . . The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions . . . .

42 U.S.C. § 405(g) (Supp. 1995).

Accordingly, this Court may affirm, reverse or remand the ALJ's decision.

II. CONTENTION OF THE PARTIES

Although the ALJ generally accepted Treinen's description of his impairments, the ALJ found that a combination of those impairments do not meet or equate to a listed impairment and that those impairments do not prevent Treinen from performing the requirements of work that exists in significant numbers in the national economy. Specifically the ALJ identified the jobs of gate tender, microcamera operator, and parking cashier. (Tr. Vol. 1, p. 34).

Treinen alleges error in the ALJ's conclusions and argues that the ALJ's decision is not supported by substantial evidence on the record as a whole. Specifically, he argues that the third hypothetical question asked during the first hearing and relied on by the ALJ was defective because it did not accurately reflect his limitations and therefore the ALJ's decision is not supported by substantial evidence on the record as a whole. (Tr. Vol. 1, pp. 222-23).

Treinen argues that the ALJ improperly discounted his subjective complaints.[5] In response, the Commissioner argues that there exists substantial evidence on the record as a whole to uphold the ALJ's decision. Additionally, the Commissioner contends that the ALJ's reliance on the vocation expert's prior testimony at the administrative hearing was proper because the vocational experts testimony and the evidence received at the first hearing was prior to Treinen's date last insured. The Commissioner argues that the ALJ was entitled to find that Treinen's allegations of disability were not entirely credible based upon this prior evidence.

A. THE "SUBSTANTIAL EVIDENCE" STANDARD

The Eighth Circuit has made clear its standard of review in Social Security cases. If supported by substantial evidence in the record as a whole, the Secretary's findings are conclusive and must be affirmed. Pickney v. Chater, 96 F.3d 294, 296 (8th Cir. 1996); Smith v. Shalala, 31 F.3d 715, 717 (8th Cir. 1994) (citing Richardson v. Perales, 402 U.S. 389, 401 (1971); 42

[5] See supra page 17 of this order discussing Treinen's subjective complaints.

U.S.C. § 405(g) (Supp. 1995)). "Substantial evidence 'is less than a preponderance, but enough so that a reasonable mind might find it adequate to support the conclusion.'" Roe v. Chatter, 92 F.3d 672, 675 (8th Cir. 1996) (quoting Oberst v. Shalala, 2 F.3d 249, 250 (8th Cir. 1993). In the words of the Supreme Court, substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

The Eighth Circuit has taken pains to emphasize that, "A notable difference exists between 'substantial evidence' and 'substantial evidence on the record as a whole.'" Wilson v. Sullivan, 886 F.2d 172, 175 (8th Cir. 1989) (quoting Jackson v. Bowen, 873 F.2d 1111, 1113 (8th Cir. 1989)).

> "Substantial evidence" is merely such "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." "Substantial evidence on the record as a whole," however, requires a more scrutinizing analysis. In the review of an administrative decision, "[t]he substantiality of evidence must take into account whatever in the record fairly

> detracts from its weight." Thus, the court must also take into consideration the weight of the evidence in the record and apply a balancing test to evidence which is contradictory.

Id.

Put simply, in reviewing the decision below, the Court must "encompass evidence that detracts from the decision as well as evidence that supports it." Andler v. Chater, 100 F.3d 1389, 1392 (8th Cir. 1996) (citing Comstock v. Chater, 91 F.3d 1143, 1145 (8th Cir. 1996)). The Court, however, does "'not reweigh the evidence or review the factual record de novo.'" Roe, 92 F.3d at 675 (quoting Naber v. Shalala, 22 F.3d 186, 188 (8th Cir. 1994)). Likewise, it is not this Court's task to review the evidence and make an independent decision. Ostronski v. Chater, 94 F.3d 413 (8th Cir. 1996) (citing Mapes v. Chater, 82 F.3d 259, 262 (8th Cir. 1996)). If, after review, it is possible to draw two inconsistent positions from the evidence and one of those positions represents the Commissioner's findings, the Court must affirm the denial of benefits. Id.

In other words, this Court "may not reverse merely because substantial evidence exists for the opposite decision." Johnson

v. Chater, 87 F.3d 1015, 1017 (8th Cir. 1996) (citing Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir. 1993)). Even in the case where this Court "might have weighed the evidence differently, [it] may not reverse the Commissioner's decision when there is enough evidence in the record to support either outcome." Culbertson v. Shalala, 30 F.3d 934, 939 (8th Cir. 1994) (citing Browning v. Sullivan, 958 F.2d 817, 822 (8th Cir. 1992)).

The process, however, is not stacked in the Commissioner's favor because, "[t]he standard requires a scrutinizing analysis, not merely a 'rubber stamp' of the [Commissioner]'s action." Cooper v. Secretary, 919 F.2d 1317, 1320 (8th Cir. 1990) (citing Thomas v. Sullivan, 876 F.2d 666, 669 (8th Cir. 1989)). In cases where the Commissioner's position is not supported by substantial evidence in the record as a whole, the Court must reverse. See Lannie v. Shalala, 51 F.3d 160, 164 (8th Cir. 1995). "'[T]he goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice.'" Battles v. Shalala, 36 F.3d 43, 44 (8th Cir. 1994) (quoting Sears v. Bowen, 840 F.2d 394, 402 (7th Cir. 1988)).

B. DETERMINATION OF DISABILITY

Determination of a claimant's disability involves a five step evaluative process. 20 C.F.R. §404.1520 (a-f). At the fifth and final step of the analysis, the burden of proof shifts to the Social Security commission to prove that there are a significant number of jobs in the national economy that a person of the same age, education, past work experience, and physical and mental residual functional capacity can perform. 20 C.F.R. § 404.1520 (f). The ALJ determined that the Commission proved that the plaintiff can perform the requirements of jobs that exist in significant numbers in the national economy.

C. THE POLASKI STANDARD AND SUBJECTIVE COMPLAINTS

The seminal case for evaluating a claimant's subjective complaints of pain in Social Security cases is Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984) (supplemented, 751 F.2d 943 (8th Cir. 1984), vacated, 476 U.S. 1167, adhered to on remand, 804 F.2d 456 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987)). In Polaksi, the Eighth Circuit held:

> The adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them.

> The absence of an objective medical basis which supports the degree of severity of subjective complaints alleged is just one factor to be considered in evaluating the credibility of the testimony and complaints. The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1. the claimant's daily activities;
> 2. the duration, frequency and intensity of the pain;
> 3. precipitating and aggravating factors;
> 4. dosages, effectiveness and side effects of medication;
> 5. functional restrictions.
>
> The adjudicator is not free to accept or reject the claimant's subjective complaints solely on the basis of personal observations. Subjective complaints may be discounted if there are inconsistencies in the evidence as a whole.

Polaski, 739 F.2d at 1322.

To conduct the proper Polaski analysis, "Merely quoting Polaski is not good enough, especially when an ALJ rejects a claimant's subjective complaints of pain." Hall v. Chater, 62 F.3d 220, 223 (8th Cir. 1995). Instead, "Polaski requires that an ALJ give full consideration to all of the evidence presented

relating to subjective complaints." Ramey v. Shalala, 26 F.3d 58, 59 (8th Cir. 1994). To that end, "When making a determination based on these factors to reject an individual's complaints, the ALJ must make an express credibility finding and give his reasons for discrediting the testimony." Shelton v. Chater, 87 F.3d 992, 995 (8th Cir. 1996) (citing Hall v. Chater, 62 F.3d 220, 223 (8th Cir. 1995)). Such a finding is required to demonstrate the ALJ considered and evaluated all of the relevant evidence. See Marciniak v. Shalala, 49 F.3d 1350, 1354 (8th Cir. 1995) (citing Ricketts v. Secretary of Health and Human Servs., 902 F.2d 661, 664 (8th Cir. 1990)). However, if "the ALJ did not explicitly discuss each Polaski factor in a methodical fashion," but "acknowledged and considered those factors before discounting [the claimant's] subjective complaints of pain. . . . An arguable deficiency in opinion-writing technique is not a sufficient reason for setting aside an administrative finding where . . . the deficiency probably had no practical effect on the outcome of the case." Brown v. Chater, 87 F.3d 963, 966 (8th Cir. 1996) (citing Benskin v. Bowen, 830 F.2d 878, 883 (8th Cir. 1987)).

D. REVIEW OF THE ALJ'S DECISION

This Court reviews the ALJ's decision to determine whether it is supported by substantial evidence on the record as a whole, that is, relevant evidence that a reasonable person might accept as adequate to support the conclusion of the ALJ.

As previously discussed, Treinen's results from the Weschsler Adult Intelligence Scale-Revised (WAIS-R) show that he has a verbal intelligence quotient (IQ) of 75, and a full scale IQ of 82. In the area of math, Treinen tested as "in the mentally retarded range." (Tr. Vol. 2, p. 306). His testing scores in math and written language skills were in the bottom one percent of the population and his reading scored in the bottom two percent. Testing indicated that his overall verbal skills were borderline in the fifth percentile, or in the bottom five percent. (Tr. Vol. 2, p. 307).

This Court finds that the ALJ erred in not including all pertinent limitations regarding Treinen's "intelligence functioning" in any hypothetical question he adopted as proven in the record. The ALJ relied on the third hypothetical question (the third hypothetical question was a combination of the first two hypothetical questions asked by the ALJ with additional

limitations added) from the prior hearing. (Tr. Vol. 1, pp. 31-33) This hypothetical, as with all of the hypothetical questions asked during the first hearing, failed to include a limitation or limitations which addressed the fact that Treinen's score in math and written language skills were in the bottom one percent of the population. Although, the third hypothetical question (Tr. Vol. 1, pp. 219-25) relied on by the ALJ did include a limitation of Treinen having only a tenth grade "special education," said hypothetical question did not include the limitation that Treinen did not graduate from high school, and did not have a GED. (Tr. Vol. 1, p. 159).

Treinen's daily activities are restricted to watching TV and changing positions in an attempt to alleviate the pain. (Tr. Vol. 1, pp. 66-67). Treinen's physical impairments impose an additional and significant work related limit. Treinen stated that he has to be able to sit, stand or lie down at will. At the hearing before the ALJ on his second application for benefits Treinen testified that his pain has increased and his wife testified that he can not vacuum because it is too much of a strain and that he is "crooked" from the pain. (Tr. Vol. 1, p.

71). During the hearing on his second application Treinen testified that he is in a lot of pain and that he spends his day laying down or "trying to walk a little bit," "staying up and down, up and down." (Tr. Vol. 1, p. 66). He testified that he does this because he is uncomfortable and that his "arm hurts very bad just in between [his] shoulder blades and neck [sic]." (Tr. Vol. 1, p. 67). He testified that he used to be right-handed but has had to learn to use his left hand and that he can no longer write or sign checks with his right hand. (Tr. Vol. 1, p. 58).

The four hypothetical questions from the first hearing have been considered by this Court. ***Supra*** pages 10-14 (Tr. Vol. 1, pp. 219-25). This Court finds the third hypothetical question asked in Treinen's prior hearing, which at the second hearing the ALJ relied on in making his findings, failed to include the nonphysical limitations of Treinen's scores in math and written language, and his physical limitation of needing to be able to change position at will, all which are supported by substantial evidence in the record as a whole. Treinen admits the third hypothetical question referred generally to shoulder problems but

argues that it did not include his need to take unscheduled breaks and to change his position at will, or his documented borderline intellectual functioning.

The limitations[6] accepted by the ALJ and included in the third hypothetical question did include a 10th grade special education and the restriction that "he is unable to perform any employment requiring detailed or complex tasks or more than a moderately paced rate." (Tr. Vol. 1, p. 33). The ALJ concluded that "the claimant was capable of performing a significant number of unskilled sedentary jobs prior to his date last insured of December 31, 1992." (Tr. Vol. 1, p. 32).

The jobs that Treinen can perform, as identified by the ALJ, were gate tender, microfilm-camera operator, and parking cashier. Each of these positions requires skills and abilities that require reasoning, math, and language skills that can be

[6] see supra pages 10-13. The third hypothetical question combines the first and second hypothetical questions with the additional limitations as stated on page 13 supra of this order.

performed by the "middle 1/3 of the population,"[7] a group that is more gifted than Treinen as to the jobs they can perform.

To meet its burden of proving that a claimant can perform substantial gainful activity, the Social Security Commission may rely on the testimony of a vocational expert. For a hypothetical question posed to a vocational expert to form the basis of an ALJ's findings, it must fully set forth the claimant's impairments. Shelltrack v. Sullivan, 938 F.2d 894, 898 (8th Cir. 1991).

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[7] The Court has reviewed the Dictionary of Occupational Titles descriptions of the jobs referred to by the ALJ. In his brief before the Court the plaintiff has argued that the positions identified by the vocational expert and accepted by the ALJ as being unskilled jobs are in fact semi-skilled jobs. Treinen's reading tested in the second percentile and his language skills tested below the first percentile, yet the ALJ found that the positions of microfilm-camera operator and parking cashier, both jobs which require a medium degree of verbal aptitude - in the middle 1/3 of the population were jobs Treinen could perform. In addition, microfilm-camera operator requires a medium degree of numerical aptitude (being able to add, subtract, divide, multiply). The position of gate tender also requires a medium degree of verbal aptitude and although the numerical aptitude required is low, the job requirement states "lowest 1/3 excluding bottom 10%" of the population. Treinen's math skills were described as being in the "mentally retarded range" and he tested "below the first percentile." This Court can not find that Treinen has the ability to perform any of these positions or any job in significant numbers in the national economy.

This was not done in Treinen's case. The ALJ here concluded:

> Although the claimant was noted to have a verbal IQ in the borderline range of intelligence, he has shown no evidence of adaptive deficits prior to the age of 22. His performance and full scale IQs were in the low average to average range. The undersigned agrees with the Disability Determination Services that prior to his date last insured, the claimant had shown only slight restriction in activities of daily living and only slight difficulties in maintaining social functioning as a result of his borderline score in verbal intelligence.

(Tr. Vol. 1, p. 26).

The above statement ignores Treinen impairment in math and other aptitudes set out above, which he would need to be able to perform in the work place.

The ALJ's focus on the plaintiff's daily activities, which included having a driver's license, being able to write his name, make simple change, care for his children, make simple meals for himself and children, watch TV, go to church, walk, and give the children baths, is misplaced. (Tr. Vol. 2, p. 28). The ALJ did not clearly explain how the plaintiff's performance of such activities make him able to perform the daily requirements of a

job. Disability under the Social Security Act does not mean total disability or exclusion for all forms of human and social activity, Harris v. Secretary of Dep't of Health and Human Servs., 959 F.2s 723, 726 (8th Cir. 1992), but it does mean being able to perform the requirements of jobs as identified as existing in significant numbers in the national economy. It is apparent that the requirements of the jobs identified, including pace and required levels of verbal aptitude and mathematical aptitude were not fully explored by the ALJ.

The ALJ states that there is nothing to support a conclusion that the claimant's impairments prior to December 31, 1992, the last day insured, were so severe as to preclude all work activity. (Tr. Vol. 2, p. 29).

This Court disagrees and finds that there is substantial evidence in the record as a whole that Treinen can not perform any job existing in significant numbers in the national economy as of December 30, 1992. In this case, the record shows that Treinen underwent surgery, takes medication for the pain and has sought treatment by several doctors for his impairments. (Tr.

Vol. 2, pp. 261, 264, 265, 276, 284, 285, 286, 296, 298, 306, 320).

The ALJ's reference to the plaintiff not seeking a psychiatric evaluation or pain management fails to discuss the circumstances surrounding the alleged noncompliance or whether such treatment would have made a difference. As for the plaintiff's daily activities, these activities are not so inconsistent with the plaintiff's testimony that they justify the ALJ's blanket finding of non-credibility. The ALJ erred in finding Treinen and his wife were not credible and erred by accepting the third hypothetical question asked at Treinen's previous hearing which failed to included both the physical and nonphysical impairments supported by the substantial evidence in the record as a whole. This Court concludes that the Social Security Commission has failed to demonstrate that there are significant numbers of jobs in the national economy that the plaintiff can perform.

1. CREDIBILITY

The findings of the ALJ clearly demonstrate that the main reason he has found against the plaintiff here is that he had

concluded that the plaintiff and his wife were not credible. (Tr. Vol. 1, p. 33).[8]

In his findings, numbered paragraph 4, the ALJ states as follows:

> The testimony of the claimant and his wife as to the intensity and severity of symptoms prior to December 31, 1992, is not credible for the reasons outlined in the body of this decision.

(Tr. Vol. 1, p. 33).

The first mention in the record as to the primary basis for this conclusion is set out where the ALJ states:

> Dr. Goldman suggested a superimposed chronic pain problem and advised the claimant to undergo psychiatric evaluation or a pain management center although the claimant never followed up with this medical advice.

(Tr. Vol 1, p. 23).

The ALJ states as follows:

> In June of 1989, the claimant underwent psychiatric evaluation at Mayo Clinic for ongoing evaluation for his right shoulder problems. He was diagnosed with somatoform pain disorder and advised to attend a pain

[8] There are only seventeen (17) pages to the ALJ's decision of September 12, 1998. The conclusion as to non-credibility is discussed on six (6) different pages.

> clinic although he failed to follow up with this medical advice.

(Tr. Vol. 1, p. 24).

The next mention of this issue is where the ALJ states:

> While subjective complaints, including allegations of pain, may not be disregarded solely because the objective medical evidence does not fully support them or because the objective medical findings, typically associated with pain do not fully corroborate its existence, subjective complaints may be discounted if there are inconsistencies in the evidence as a whole.

(Tr. Vol. 1, p. 27).

The ALJ is calling inconsistencies the fact that the claimant states that he has continual pain but he would not go to a pain management clinic.

The next mention of the situation is where the ALJ states:

> After the claimant underwent surgery, his treating surgeon felt the claimant could return to work and he was released to return to work with some restrictions in 1988. The claimant was advised to seek psychiatric treatment for somatoform pain disorder and chronic pain syndrome although he failed to follow this medical advice.

(Tr. Vol. 1, p. 29).

The next mention of credibility is set out where the ALJ states:

> The claimant sought no further treatment for his complaints of pain other than occasional pain medication prior to his date last insured. For all of the above reasons, the undersigned finds the testimony of the claimant and his wife is less than credible.

(Tr. Vol. 1, p. 30).

The next mention of credibility is where the ALJ states as follows:

> The undersigned finds that the restrictions given at the previous hearing are consistent with all the medical evidence including the opinion of Disability Determination Services. The only evidence which was inconsistent with those restrictions was the claimant's testimony which has been found to be less than credible.

(Tr. Vol 1, p. 31).

The bottom line is that the ALJ is premising his entire conclusions on the fact that, as mentioned above, the claimant was told on more than one occasion that if his pain was as bad as he stated, he should be going to a pain management clinic. The record shows that the claimant stated that he did not believe in such treatment, (Tr. Vol. 2, p. 299). The ALJ centered in on

that statement, determined that the claimant didn't really have the pain that he claimed because if he did, he would be taking the advice of his doctors and going into pain management. Further, the ALJ assumed that a pain management course was available nearby and this out of work claimant had the wherewithal to immediately start it.

There is one glaring omission in the conclusion that if he really had enough pain he would jump into pain management. The ALJ "forgot" who he was talking to and who he was talking about and assumed that the claimant (Treinen) had made a reasoned, smart, logical decision when he said he didn't believe in pain management. The ALJ was talking to a person who has shortcomings which are clearly set out in the record as stated on January 12, 1990 by Dr. Picket a licensed psychologist:

> [Treinen's score on the Wechsler Adult Intelligence Scale, indicated] "low average range of intelligence characterized by average non-verbal and borderline verbal skills."

(Tr. Vol. 2, pp. 306-07).

The ALJ's conclusion that Treinen is not credible is falsely based on the ALJ's assumption that Treinen understood and thought

like a “normal” person. He did not. Pain management is an approach which involves teaching an individual how to change their behavior, and is sometimes referred to as cognitive therapy. Pain management is a theory of treating pain that shifts the focus from those treating the pain to the person who is suffering and assumes that the person who is suffering the pain has the intelligence and ability to be taught how to manage pain.[9]

It could well be argued that he made a dumb decision about pain management, but not because of lack of credibility. This decision is not too surprising when you remember “he appeared to be functioning in the borderline or dull normal range of general intelligence.” (Tr. Vol. 1, p. 87). As mentioned, Treinen’s reading scored in the bottom two percent of the population. Testing indicated that his overall verbal skills were borderline in the fifth percentile, or in the bottom five percent. (Tr. Vol. 2, p. 307). Was pain management ever carefully explained to Treinen? Did he have the mental capacity to properly consider

[9] See Robinson, Charles (1995). Pain: Psychological Paradigms and Practice. 1995 Maine State Bar Association Medical Institute. Augusta, Maine.

going into pain management and could he have handled it if he did? The record is not complete as to these questions.

There is a quote in the ALJ's decision which states as follows, "The claimant had worked quite successfully for eight [8] years prior to his injury in 1987. (Exhibit 36)." (Tr. Vol. 1, p. 24).

This clearly shows that prior to his injury, the claimant was a solid working person who was not ducking work. The ALJ has concluded that the claimant here has overstated the degree of his pain and the intensity and severity of his symptoms since his claimed first onset date of May 27, 1987 to the date of his hearing June 25, 1998. (Tr. Vol. 1, pp. 18-19). The bottom line is that the ALJ has concluded that this "overstated malingerer," supported by this wife's falsehoods, has been trying to dupe social security for eleven plus years. This is not consistent with a person who was working successfully for several years prior to his injury.

2. SERIOUS PROBLEMS THAT COULD NOT BE FIXED

The ALJ has missed the point on other issues in relation to the claimant here. For example, Dr. Goldman reported on January

31, 1989, some three (3) years before the claimant's eligibility had expired, that: "

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Dr. Goldman also found in a report of 1988, that nothing that Treinen had would be helped by surgery. (Tr. Vol. 2, p. 296). His doctor concluded that Treinen had gotten as well as he was going to get and no surgery would help. The doctor further said, "try pain management." As mentioned, the ALJ assumes it was available nearby and that this out of work claimant had the

wherewithal to immediately start it. This Court found nothing in the record to support this assumption.

3. MARIJUANA

The ALJ further states as follows:

> While undergoing psychiatric treatment in January of 1997, the claimant acknowledged that he had quit regular marijuana use two [2] years earlier although he had last used one [1] month earlier. The claimant also noted that he had been a daily user of marijuana up until his injury in 1987. However, at the hearing, the claimant alleged that he had never smoked or used marijuana.

(Tr. Vol. 1, p. 30).

This may zero in on the fact that the claimant, at the hearing, lied about having used marijuana in the past. (Tr. Vol. 1, pp. 65-66). This Court is not condoning the use of marijuana nor the wrongful denial of using it, but has not been able to ascertain how the use or non-use of marijuana would affect any of the basic material issues in this social security case. The ALJ did not mention marijuana in his statement of issues. (Tr. Vol. 1, p. 19). The claimant might well have also denied that he ever robbed any banks or beat up on his wife or drank whiskey. If he did it would be an understandable nonmaterial denial made before

an Administrative Law Judge who had serious matters relating to the claimant's future before him. Whether or not he used marijuana, whether or not he lied about it is a nothing issue here. It would appear that the ALJ gave that much more consideration than was appropriate under the circumstances.

This Court is well aware that the window for any claim in this cause is from May 22, 1991, through December 31, 1992. The Court is persuaded that the supposed lack of credibility by the claimant and his wife, for the reasons set out above, constitutes an inappropriate conclusion by the ALJ.

III. CONCLUSION

Where the record overwhelmingly supports a disability finding and remand would merely delay the receipt of benefits to which plaintiff is entitled, reversal is appropriate. Andler v. Chater, 100 F.3d 1389, 1394 (8th Cir. 1996). In this case, the record clearly supports a disability finding. Accordingly, reversal of the Social Security Commissioner's decision is appropriate.

The final decision of the Social Security Commission, denying Treinen's application for Social Security disability

benefits, is not supported by substantial evidence on the record as a whole. Based on the physical and non-physical limitations that were improperly omitted from the hypothetical questions, there are not a significant amount of jobs in the national economy that the plaintiff can perform. The plaintiff is disabled. This Court finds Treinen to be disabled as of December 30, 1992.

Upon the foregoing,

IT IS THEREFORE HEREBY ORDERED the decision of the ALJ, based on the application filed on September 19, 1996, is reversed and Treinen is entitled to a period of disability or disability insurance benefits under sections 416 (i) and 423, respectively, of the Social Security Act and the Commissioner is directed to compute and award benefits to Treinen with an onset date of December 30, 1992.

IT IS SO ORDERED THIS ____ DAY OF NOVEMBER, 2001.

_____

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa